

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 23, 2007 Session

RONALD PHILLIPS v. STRANGE TRUCK LINES

Appeal from the Circuit Court for Cocke County
No. 30,005-IV O. Duane Sloane, Judge

No. E2007-00160-COA-R3-CV - FILED MARCH 27, 2008

This suit arose out of a two-vehicle collision in Cocke County on September 15, 2005. Ronald Phillips (“the plaintiff”) initiated this action by filing a civil warrant in General Sessions Court. The sole defendant was Strange Truck Lines (“the defendant”). Following a bench trial, the General Sessions Court entered judgment for the defendant. The plaintiff appealed to the trial court. In the trial court, the defendant filed a motion for summary judgment with supporting material. The plaintiff responded. The trial court granted the defendant summary judgment. The plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Larry V. Roberts, Kingsport, Tennessee, for the appellant, Ronald Phillips.

Terrill L. Adkins, Knoxville, Tennessee, for the appellee, Strange Truck Lines.

OPINION

I.

The plaintiff’s civil warrant seeks a judgment against the defendant for “the negligence of [the defendant’s] employee, David [Moskalski] while negligently operating the [d]efendant’s vehicle in Newport, Cocke County, TN” The defendant’s summary judgment motion was supported by a Tenn. R. Civ. P. 56.03 “statement of the material facts as to which the moving party contends there is no genuine issue for trial.” *Id.* It also attached excerpts from the verbatim transcript of the bench trial in General Sessions Court.

The plaintiff filed a response to the defendant's motion. In addition to excerpts from the General Sessions Court trial, the plaintiff attached his affidavit reciting, in pertinent part, as follows:

I, Ronald E. Phillips, on the morning of the accident with the Strange Truck Lines tractor-trailer, was traveling to work about 6:00 a.m. in my vehicle, when all of a sudden I felt a hard knock or jolt to my vehicle, causing my vehicle to turn sideways into the opposite lane of travel. *I did not see, nor was I aware of, the tractor-trailer until it struck my vehicle.*

When the accident occurred, I was traveling about 40 miles per hour on a straight stretch of road.

Since the accident, I have returned to the accident site. Based on my observation of the accident site following the accident, the truck driver was traveling on a relatively flat area of road before coming to a slight incline as the road comes onto the road I was traveling when the tractor-trailer struck my vehicle.

After viewing the accident site following the accident, hearing the truck driver state that the tractor-trailer was loaded with 80,000 pounds, not seeing the tractor-trailer until it struck my vehicle and experiencing the sudden hard knock or jolt that I did when the accident occurred, it appears to me that the tractor-trailer driver tried to enter the road I was traveling on without stopping, while pulling onto the road I was traveling.

(Paragraph numbering in affidavit omitted; emphasis added).

On January 4, 2007, the trial court entered a "Summary Judgment" in favor of the defendant finding "no genuine issue of material fact upon which relief may be granted against the [d]efendant based upon allegations of negligence as a matter of law." This appeal followed.

II.

The plaintiff raises two issues:

1. Whether summary judgment was properly granted against him.
2. Whether he should have been provided the General Sessions Court trial transcript.

III.

When a party seeks summary judgment, it “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. In a negligence action, the plaintiff’s burden – when faced with a properly-supported motion for summary judgment – is clearly stated in *Doe v. Linder Const. Co., Inc.*, 845 S.W.2d 173 (Tenn. 1992):

For a negligence case to go before a jury, the plaintiff has the burden to present facts sufficient to establish the necessary elements of negligence. The standard in a negligence case is that,

If, as a matter of law, the plaintiff has failed to allege or prove facts sufficient to establish notice, the existence of the duty to act, breach of the duty, or proximate cause, dismissal, summary judgment, or a directed verdict would be appropriate.

Id. at 183 (quoting *Tedder v. Raskin*, 728 S.W.2d 343, 349 (Tenn. Ct. App. 1987)).

IV.

The evidence in the record fails to establish any negligent driving on the part of the defendant’s driver that proximately caused the subject collision. At the time of the collision, both the plaintiff’s automobile and the defendant’s tractor and fully-loaded flatbed trailer were proceeding on U.S. Highway 25-70 toward Newport. Prior to the collision, the plaintiff’s vehicle was to the rear of the defendant’s vehicle. As the plaintiff’s vehicle was attempting to overtake the defendant’s vehicle, the two vehicles collided, side-to-side, resulting in the property damage and personal injuries for which the plaintiff seeks to be compensated in his civil warrant.

The material filed by the defendant in support of its motion for summary judgment reflects (1) that the defendant’s driver was not driving at a speed in excess of the speed limit; (2) that the defendant’s vehicle was equipped with the appropriate lights, all of which were operable and on; and (3) that the defendant’s driver did nothing untoward that caused or contributed to the collision. The material filed by the plaintiff in response to the defendant’s filings consists of (1) excerpts from the General Sessions Court trial – none of which creates a genuine issue of material fact on the subject of the defendant’s negligence and causation – and (2) the plaintiff’s affidavit, previously quoted in full in this opinion. Significantly, the plaintiff, in his affidavit, states that “I did not see, nor was I aware of, the tractor-trailer until it struck my vehicle.” It goes without saying that the plaintiff cannot testify, of his own personal knowledge, as to negligent driving by the defendant’s operator as to any period of time before he became aware of the defendant’s vehicle. He does not *directly*

attempt to do so. However, in the last paragraph of the affidavit, the plaintiff attempts to create a genuine issue of material fact by stating the following:

After viewing the accident site following the accident, hearing the truck driver state that the tractor-trailer was loaded with 80,000 pounds, not seeing the tractor-trailer until it struck my vehicle and experiencing the sudden hard knock or jolt that I did when the accident occurred, it appears to me that the tractor-trailer driver tried to enter the road I was traveling on without stopping, while pulling onto the road I was traveling.

He is unsuccessful in his attempt to create a material factual issue. This is nothing more than the plaintiff's opinion as to what happened or, stated another way, his theory of how the collision occurred. One's *opinion* or *theory* does not create a genuine issue of material *fact*. Based upon the record before us, we conclude there is no genuine issue of material fact to be submitted to a jury for resolution. The trial court correctly granted summary judgment in this case.

V.

The parties argue in their respective briefs as to whether the plaintiff was entitled to a copy of the transcript of the General Sessions Court trial. As would be expected, the plaintiff argues that he is; the defendant argues that he is not.

In an order entered November 13, 2006, following a hearing on November 3, the trial court resolved the parties' dispute in favor of the plaintiff:

It appearing to the Court that Plaintiff's counsel and Defendant's counsel discussed obtaining the services of a court reporter jointly the day prior to the Cocke County General Sessions Court Trial, it appearing that Plaintiff's counsel understood with Defendant's counsel that the court reporter was retained jointly by the Plaintiff and Defendant, it is ORDERED that Defendant's counsel shall provide a copy of the Cocke County General Sessions Court trial transcript to Plaintiff's counsel and that the Plaintiff shall pay one-half of the court reporter's per diem and one-half of the transcript cost to Defendant's counsel within 30 days of entry of this Order

There is nothing in the record indicating that the trial court's decision regarding the transcript is erroneous. Hence, we find no error in the court's judgment.

The plaintiff's brief indicates that he never got a copy of the transcript. If this is the case, it is his own fault. He had a court order granting him the right to get the transcript from the defendant.

If – as appears from the record – he took no action to enforce the trial court’s order, he cannot now be heard to complain.

VI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Ronald E. Phillips. This case is remanded to the trial court for collection of costs assessed there, pursuant to applicable law.

CHARLES E. SUSANO, JR., JUDGE